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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~689~~ 34

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

TABLE OF CASES CITED

Other Authorities Cited

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner, Times Film Corporation, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on November 27, 1959.

Citation to Opinions Below

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is set forth in U. S. D. C. E. D. Ill. 58-C-968 (1959).

and is attached hereto as Appendix A. The opinion of the United States Court of Appeals for the Seventh Circuit is USCA 7—12717 (1959), not yet reported, and is attached hereto as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered November 27, 1959.

The jurisdiction of this Court is evoked under 28 U. S. C. Section 1254 (1).

Question Presented

Are those provisions of the Chicago licensing ordinance which provide for censorship of all motion pictures prior to their exhibition void as an unconstitutional infringement of rights guaranteed under the First and Fourteenth Amendments?

Statutory Provisions

The statutory provisions involved are Sections 1 through 7 of Chapter 155 of the Municipal Code of the City of Chicago and the First and Fourteenth Amendments of the United States Constitution. They are printed in Appendix D, infra, pp. 15a-17a.

Statement

This action arises pursuant to a Complaint filed by Times Film Corporation, Petitioner, against the City of Chicago, Richard J. Daley, its Mayor, and Timothy

J. O'Connor, its Police Commissioner. The facts are undisputed and a Stipulation of the Facts was entered into by Petitioner and defendants and filed with the court below (R-25).

Petitioner has the exclusive right to distribute, license for public exhibition and to publicly exhibit in the City of Chicago a motion picture entitled "Don Juan." On December 10, 1957, Petitioner applied for a license to publicly exhibit "Don Juan," submitting the license fee to defendant O'Connor with its application as required, but refusing to comply with the requirement of the ordinance which authorized the City to review the film for censorship of content. On December 17, 1957, defendant O'Connor denied Petitioner's request for a license on the ground that it had failed to submit the motion picture for censorship as required under the ordinance.

On December 23, 1957, pursuant to the provisions of the ordinance, Petitioner appealed the decision of defendant O'Connor to defendant Daley. On December 27, 1957, defendant Daley denied the appeal and refused to issue a permit without submission of the film for censorship.

On May 28, 1958, Petitioner thereupon commenced the above entitled action in the United States District Court for the Northern District of Illinois, Eastern Division, by the filing of a Complaint against the City of Chicago, its Mayor and Police Commissioner, the respondents herein. On May 29, 1959, the trial court filed its Memorandum and Order (R-27), entering judgment for the defendants and dismissing the case. Petitioner thereupon appealed the decision below to

the United States Court of Appeals for the 7th Circuit, which upheld the lower court on decision handed down November 27, 1959 (Appendix B, pp. 5a-12a).

Jurisdiction in the District Court is invoked under 28 U. S. C., Sections 1331 and 1332, in that the action arises under the Fourteenth Amendment to the Constitution of the United States and in that there is diversity of citizenship between the petitioner, a citizen of the State of New York, and respondents, all of whom are citizens of the State of Illinois. The amount in controversy exceeds $3,000.00 exclusive of interests and costs and the case was filed prior to the statutory change in the requisite jurisdictional amount.

Reasons for Granting the Writ

1. The court below has decided an important question of federal law which has not been but should be, decided by this Court.

In its decision in *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), this Court squarely held that motion pictures were a medium of communication entitled to the protective mantle of the First Amendment. In the *Burstyn* case the motion picture "The Miracle" had been banned by the New York censors on the ground that it was sacrilegious. This Court proceeded to void the action of the New York censors, holding that in no event could a standard such as sacrilege be upheld. This Court did not reach the ultimate issue of whether a state or municipality may require censorship of motion pictures for content under other standards. Thus, while censorship of newspapers and other media

of communication protected by the First Amendment is clearly void (*Near v. Minnesota*, 283 U. S. 697 (1931) and cases following), it is not clear whether a state or municipality may require such censorship of motion pictures under a "clearly drawn" statute or ordinance. The specific question reserved by this Court in the *Burstyn* decision (343 U. S. at 506) is thus squarely presented by this case.

As a result of the question left open in the *Burstyn* case, most decisions involving the constitutionality of movie censorship which have come out of the lower courts since the *Burstyn* case have been limited to a determination of whether the particular standard used in the statute or ordinance was more, or less, clearly drawn than the New York standard struck down in the *Burstyn* case. And although this Court has voided a number of statutes on the authority of the *Burstyn* case, and reversed a number of lower court decisions upholding the banning of motion pictures, it has not had the occasion to pass upon the ultimate issue. Consequently an important area of federal law has become beclouded, resulting in extended litigation and in contradictory decisions by lower courts. It has also put this Court, the state courts and the lower federal courts in the position of being a super censor to review the decisions of state and local censorship authorities.

Attached to this Petition as Appendix C is a progeny of this uncertainty, showing the litigation which has arisen from the Chicago ordinance alone since the *Burstyn* case. This petitioner has been involved in three of those cases in Chicago. The "Chicago system" requires extensive and expensive litigation to clear motion pictures banned by the censors. Such a system

obviously has the effect of discouraging the untrammeled communication of ideas which the First Amendment sought to project and which by the *Burstyn* case encompasses motion pictures. Appendix C is further significant, aside from its quantity, in its uniformity of results. In not one instance have the censors been upheld. The courts, in several instances appellate courts including this Court, have had to be censors *de novo* to reverse the results of the censors' findings. As the various opinions of this Court in *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 358 U. S. 897 (1958) indicate, this is a function not peculiarly suited to courtroom litigation. A resolution of the ultimate question presented by this case can relieve the courts of their present duties as "super censors."

The ultimate issue cannot and should not be resolved by a lower court. It can be finally resolved only by this Court and certiorari should, therefore, be granted to clear up the confusion in this field by applying to the exhibition of motion pictures the same cardinal principles governing the other media of communication, which principles uniformly condemn censorship of content.

2. The Court below has decided a federal question in a manner conflicting with the applicable decisions of this Court.

In the decisions subsequent to the *Burstyn* case, this Court has consistently voided the various statutes and ordinances seeking to censor motion pictures. The standards used in the Chicago ordinance are identical to the standards struck down in such cases. Thus, in

Holmby Productions, Inc. v. *Vaughn*, 350 U. S. 870 (1955), this Court, in a *per curiam* decision, held invalid a Kansas statute providing for censorship of all films and for the banning of those which were "immoral and obscene." The Kansas Supreme Court had specifically narrowed the issue to that of the constitutionality of the standard used in that statute. None of the other standards used in the Chicago ordinance here in question can withstand the constitutional tests laid down in the *Burstyn* case, the *Holmby* case, the *Kingsley* case and other cases decided by this Court. Section 155-4 of the ordinance requires denial of a permit for any motion picture which "portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being." We submit that all of these "standards" fall within the prescription set forth by this Court in the various cases cited above.

We submit that the basis of the opinion of the Court of Appeals is in square conflict with the principles of the *Burstyn* case. The Court of Appeals drew a distinction between newspapers and motion pictures stating as follows:

> "Plaintiff makes clear its contention that the city's power is limited to punishment after the fact, just as it is in other areas of criminal law. If that contention is correct, thus barring censorship before a film is exhibited in public theaters, actual prior restraint will scarcely exist as to the exhibition of a film in theatres. While it is com-

> mon knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration is at most a theoretical remedy of prevention."

We submit that it is *not* common knowledge that the theater industry is less responsible than the newspaper or the television industry. Moreover, even if it *were* common knowledge, the "responsibility" of a particular industry cannot be the basis for different constitutional protections.

As to the lower court's contention that petitioner had no standing in court and could not raise the constitutional issue, this was erroneous. Petitioner complied with all requirements of the licensing law except as to the submission of the film. Petitioner has received no benefits under the ordinance and is, therefore, at complete liberty to attack that precise part of the law to which it has not submitted itself, to wit, the censorship scheme contained in the ordinance. In *Union Pacific RR Co.* v. *Public Service Commission,* 248 U. S. 67 (1918), this Court admitted an attack upon a licensing scheme after a license had been applied for. In the *Burstyn* case, this Court passed on the constitutional issue after a license had been issued for the showing of the film and was later withdrawn.

In the case before this Court, the lower court held that:

> "Without knowledge of this film's contents, the district court and we are not in a position to determine whether plaintiff has a right to exhibit its film without city censorship."

The contradiction in this statement is patent, as censorship would be a fait accompli once the film were shown to the city in advance of exhibition. In *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 121 N. E. 585 (1955), the Illinois Supreme Court placed a construction on the ordinance in question which requires every reviewing court to try the facts *de novo* and in effect places each reviewing court in the role of the censor board. Under this construction, petitioner could never challenge the constitutionality of the censorship requirement since each court itself must act as the censor. If, as petitioner contends, such censorship provisions are unconstitutional, it is entitled to a permit on the payment of the license fee, which was tendered to the City.

The Stipulation of Facts clearly states that petitioner has been "directly damaged by not being permitted to exhibit said motion picture film" (R-26). The Stipulation further makes it clear that petitioner was prohibited from exhibiting the motion picture under penalty of arrest and fine (R-25). This clearly puts the case out of the realm of theoretical questions. If the requirement of submission for censorship of content is constitutional, then petitioner's case is one of *damnum absque injuria*. If such requirement is not constitutional, however, petitioner is entitled

to redress of its damage by a direction that the city issue a permit.

Equity has jurisdiction to stop the damage caused by the city's ban, without necessitating exposure by petitioner to criminal prosecution and oppressive fines, which a violation of the ordinance would, by its terms, entail. *Terrace* v. *Thompson,* 263 U. S. 197 (1923) and cases following.

Indeed, the argument is much more impelling that the censorship scheme is wholly unnecessary since Illinois, like most other states, has criminal laws prohibiting the public exhibition of hard core pornography and other objectional material which no one seeks to defend. Ill. Rev. Stat. 1959, Ch. 38, Section 470. It is under such a law that the city and state should exercise whatever control is necessary rather than the ordinance such as the one in question. The Court of Appeals for the 7th Circuit itself made this point in *Capitol Enterprises, Inc.* v. *City of Chicago,* 260 F. 2d 670, 672 (C. A. 7, 1958) when it said:

> "But, there is a wide chasm between censoring motion pictures before deciding if they can be publicly exhibited and exhibiting a picture to the public for which criminal punishment might be imposed. In the latter situation all the familiar procedural safeguards come into play while in the other instance there are no procedural safeguards and communication is choked off at the threshold. Submission to compulsory censorship as a condition precedent to public exhibition is undoubtedly more facile unencumbered, as it is, by any procedural safeguards. Complete censorship, as we now have before us, is much like the

> case of obtaining indictments before a grand jury—no defense counsel is present. There, however, the analogy ends for persons accused of crime are eventually accorded some rights, but in censorship social context may be measured by six or seven persons against, as here, a society of more than approximately 3,620,962 persons, and the applicant for a permit apparently need never be heard, nor is the right to trial by petit jury available."

(There the court reversed the censors on another motion picture arising out of the Chicago ordinance.)

The protection which the court below believed necessary for the state and city to have could best be afforded under the criminal law with its attendant safeguards rather than under the precensorship ordinance here in question with its attendant objections.

CONCLUSION

For the foregoing reasons, this Petition for Writ for Certiorari should be granted.

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APPENDIX A

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—58-C-968) * *

MEMORANDUM AND ORDER.

CAMPBELL, *District Judge.*

This action arises pursuant to the Complaint filed by Times Film Corporation against the City of Chicago, Mayor Richard J. Daley and Police Commissioner Timothy J. O'Connor, and is submitted on the basis of a stipulation of facts for final decision.

Pursuant to the provisions of Sections 155-1 to 155-7 of the Municipal Code of Chicago, plaintiff applied to defendant, O'Connor for a permit to exhibit the motion picture, "Don Juan". Defendant O'Connor notified plaintiff that he would not issue such a permit because such permit could only be granted after the film had been produced at the office of the Commissioner of Police for examination. Plaintiff refused to so submit such film, but appealed to defendant Daley who denied the appeal. Because of plaintiff's refusal to produce the film at the office of the Commissioner of Police and the consequent denial of a permit, plaintiff is prohibited from exhibiting the motion picture "Don Juan" under penalty of a fine of not less than $50.00 nor more than $100.00 for each day the picture is exhibited without a permit.

Plaintiff alleges that said ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States.

and prays for injunctive relief in order to exhibit the said film in the City of Chicago.

It is my opinion that I am without jurisdiction to hear this cause on many grounds.

First: Before I can be called upon to pronounce this Statute unconstitutional—the most "important and delicate duty of this Court which is only to be used as a "last resort"—there must exist a "justiciable controversy." In my opinion, no such controversy exists. *Muskrat* v. *U. S.*, 219 U. S. 346; *Skelly Oil Co.* v. *Phillips*, 339 U. S. 667, 672; *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 583, 597-598; *U. S.* v. *Johnson*, 319 U. S. 302; *Willing* v. *Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74-76; *Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39; *Oldland* v. *Gray*, 179 F. 2d 408; *Coffman* v. *Federal Laboratories*, 55 F. Supp. 501. Nor has there been presented, a "substantial" federal question. *Gully* v. *First National Bank*, 299 U. S. 109, 114. Nor has plaintiff suffered a direct or threatened injury. *Hague* v. *C. I. O.*, 307 U. S. 496, 507, 508; *Frothingham* v. *Mellon*, 262 U. S. 447.

Second: In essence, the Complaint is concerned with the exhibition of the film, "Don Juan" in the City of Chicago. Had plaintiff submitted said film for examination by the Commissioner of Police as the Ordinance requires, the Commissioner may have approved the film which would have, of necessity, dispelled any need for legal action. The cases are legion

which hold that one who has failed to make proper application, is not at liberty to complain because of his anticipation of improper or invalid action. *Bourjois* v. *Chapman*, 301 U. S. 183, 188; *Dist. of Columbia* v. *Clawans*, 300 U. S. 608, 616; *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56; *Gundling* v. *Chicago*, 177 U. S. 183, 186. And see *Kingsley Inter. Pic. Corp* v. *City of Providence, R. I.*, 166 F. Supp. 456, 460.

Plaintiff cannot seriously contend that prior restraint of motion pictures is, per se, a violation of the 1st and 14th Amendments. *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 502. Plaintiff has also failed to analyse *Times Film Corporation* v. *City of Chicago*, 355 U. S. 35 which presumptively sustains the constitutionality of the Ordinance in question in the light of *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 121 NE. 2d 585, though reversing on the "facts". It is therefore impossible to contend that the Ordinance is "void on its face". (I take into consideration *Paramount Film Distributing Corp.* v. *City of Chicago*, (58 C 437), which recently declared one section of the Ordinance unconstitutional).

Third: Plaintiff has not been restricted from the exhibition of the film "Don Juan" except by the statutory sanction of a fine. That such a fine would be levied against plaintiff if plaintiff exhibited said film is not only hypothetical but also "too remote and abstract an inquiry for the proper exercise of the judicial function". *Longshoremen's Union* v. *Boyd*, 347 U. S. 222, 224; *United Public Workers* v. *Mitchell*, 330 U. S.

75, 89-91; *New Jersey* v. *Sargent*, 269 U. S. 328. This cause falls within the self imposed restraints upon the federal courts so well expressed by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345 *et seq.* Also see *United States* v. *Auto Workers*, 352 U. S. 567, 590, 591.

Fourth: Without specific allegations, plaintiff broadly contends that said Ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States. This type of "scatter-shot" attack upon the constitutionality of a statute has been expressly condemned. *Staub* v. *City of Baxley*, 355 U. S. 313, 332.

Fifth: Here, since plaintiff has not and will not suffer an immediate and irreparable harm, I am without equitable jurisdiction to grant the injunctive relief requested. *Kingsley Inter. Pic. Corp.* v. *City of Providence, R. I.*, supra, *Douglas* v. *City of Jeanette*, 319 U. S. 157. A federal court of equity should only interfere with the enforcement of state laws to prevent irreparable injury which is clear and imminent. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593.

Judgment for defendants. Cause dismissed at plaintiff's costs.

CAMPBELL,
Judge.

May 29, 1959.

APPENDIX B

Opinion of Circuit Court

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12717 SEPTEMBER TERM, 1959

SEPTEMBER SESSION, 1959

TIMES FILM CORPORATION, a New York corporation,
Plaintiff-Appellant,

v.

THE CITY OF CHICAGO, a municipal corporation, RICHARD J. DALEY, its mayor, and TIMOTHY J. O'CONNOR, its police commissioner,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

November 27, 1959.

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. From a judgment for defendants, The City of Chicago, a municipal

Appendix B'

Opinion of Circuit Court

corporation, Richard J. Daley, its mayor, and Timothy J. O'Connor, its police commissioner, dismissing the plaintiff's cause, the latter has appealed.

By its complaint, plaintiff sought an order from the district court commanding defendants to forthwith issue to plaintiff the permit required by the city's ordinance, known as §§ 155-1 to 155-7 of the Municipal Code of the City of Chicago, alleging that it applied to O'Connor for a permit to exhibit a motion picture film entitled "Don Juan", but that he did not issue the permit on the ground that such a permit shall be granted only after such film had been produced at his office for examination; that an appeal to defendant Daley proved unsuccessful, and that, without a permit, plaintiff is prohibited from exhibiting said film under penalty of arrest and criminal prosecution, all in denial of plaintiff's rights under the first and fourteenth amendments to the constitution of the United States.

The defendants having answered the complaint, and the facts having been stipulated, the court entered the judgment from which the appeal was taken.

§ 155-1 of the ordinance provides:

> "It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture * * * without first having secured a permit therefor from the commissioner of police.
>
> * * * *
>
> "Any person exhibiting any picture or series of pictures without a permit having been ob-

tained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. * * *"

155-4 of said ordinance reads:

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace of riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

* * * *

In its complaint, plaintiff has limited its statement of the facts in an obvious attempt to so frame its case that the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship, a course from which, according to Mr. Justice Harlan, *Kingsley Picture Corp.* v. *Regents of U. of N. Y.*, 360 U. S. 684, 708, the Court has carefully abstained. In plaintiff's paring down of the facts, however, it has reduced the case to an abstract question of law. It is fundamental that, while the courts will adjudicate controversies, they will not announce opinions where concrete issues in actual cases are not set forth. In *United Pub-*

lic Workers v. *Mitchell*, 330 U. S. 75, 89, the court said:

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. * * *"

The subject matter involved in this case is, according to the complaint, a moving picture film, which is described in no way except as "Don Juan". The nature of its contents, either generally or specifically, is not revealed by the complaint and is not alleged to have been made known to defendants. The film itself was not tendered to the district court or this court and is not in the record. No one, except those in privity with plaintiff, knows whether the film Don Juan, for which the protection, first of this court, and eventually of the United States Supreme Court, is sought, is a picture of (for instance) a happy Sunday School picnic, a bullfight, or any one of the following (*inter alia*): (a) an immoral or obscene act, (b) exposure of the citizens of any race, color, creed or religion to contempt, derision or obloquy by attributing to them depravity, criminality or lack of virtue, (c) acts tending to produce a breach of the peace or riots, or (d) a hanging, lynching, or burning of a human being. With the physical object constituting the subject matter of this complaint hidden from the court, we are left to guess as to what our holding is to apply. If we grant the relief prayed, we will be sanctioning the public

exhibition of we know not what. It might be a portrayal of a school of crime, which, for instance, teaches the steps to be taken in successfully carrying out an assassination of a president of the United States as he leaves the White House; or shows how to arrange an uprising of subversive groups in one of our cities.

Although plaintiff, evidently for strategic purposes, refuses to take a stand which will reveal the contents of the film, certain arguments in its brief point strongly to the fact that the film is one subject to a charge of obscenity. Most of the cases cited by it involve that charge. Specifically, plaintiff refers to *Times Film Corp.* v. *City of Chicago,* 244 F. 2d 432, where we considered a film charged to be obscene. The brief of counsel for the plaintiff in the case at bar quotes at great length from the report of a master in chancery in that case, only a small part of which we set forth below:

> "At least it cannot be concluded that, for the purposes of limiting the basic constitutional protection to freedom of expression, arousal of sexual desires in normal persons is in the same category as danger to the nation at war, or incitements to riots and acts of violence, or to the overthrow by force of orderly government, or even with expressions which have the effects of force."

The same ordinance is involved in both that case and this. We may fairly infer that, in plaintiff's opinion, obscenity is in the same category, for present purposes, with incitement to riots.

Appendix B

Opinion of Circuit Court

We recognize that there may be differences of opinion as to whether a film, if it tends to produce a breach of the peace or riots, is entitled to be shown in a theater repeatedly as long as the theater manager is willing to post appearance bonds following repeated arrests for violation of the criminal sections of the ordinance, or whether such a showing of the film should await its approval by a censorship board. But those differences should be resolved by a court having possession of the full facts, none of which is more relevant than the film itself. We would not emulate the play of Hamlet without Hamlet. Without the film before the court, we are presented with a hypothetical case in which even the hypothesis is incomplete. We are being asked to adjudicate an abstract question of law, based upon an incomplete skeleton of facts. Without knowledge of the film's contents, the district court and we are not in a position to determine whether plaintiff has a right to exhibit its film without city censorship.

In *Longshoremen's Union* v. *Boyd*, 347 U. S. 222, the court said, at 224:

> "* * * That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers* v.

Mitchell, 330 U. S. 75; see *Muskrat* v. *United States*, 219 U. S. 346, and *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450. Since we do not have on the record before us a controversy appropriate for adjudication, the judgment of the District Court must be vacated, with directions to dismiss the complaint."

Plaintiff makes clear its contention that "the city's power is limited to punishment after the fact, just as it is in other areas of criminal law." If that contention is correct, thus barring censorship before a film is exhibited in public theaters, actual prior restraint will scarcely exist as to the exhibition of a film in theaters. While it is common knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration, is at most a theoretical remedy of prevention. It would be practically ineffectual, especially in this case. Plaintiff, owner of the film, is a New York corporation, having its place of business in New York City. It does not appear that it has any headquarters in Illinois. A criminal prosecution against the operator of the projector showing the film in a theater in Chicago, or against some other employee of the theater, would be practi-

cally doomed to failure as a means of *stopping* the showing of the film. Even if such a prosecution finally culminated in a conviction, in the meantime the damage caused by the showing of the film would have been done. A film which incites a riot produces that result almost immediately after it is shown publicly. Likewise, the effect upon the prurient mind of an obscene film may result harmfully to some third person within hours after the film has been shown. These are disadvantages of the doctrine of limiting the power of the city to punishment after the fact, for which plaintiff contends.

We have briefly referred to some of the considerations which bear upon the abstract question presented by plaintiff. The film not being before the court, no hypotheses will be assumed to apply to its contents. For the reasons hereinbefore set forth, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

List of Cases Arising Under Municipal Ordinance in Question

American Civil Liberties Union v. *City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585 (1955) (*The Miracle*):

Censor Board: Obscene and immoral.
Ill. Supreme Court: Reversed and remanded for further proceedings.
U. S. Supreme Court: Refused review for want of final judgment. Three Justices dissenting.
Trial Court: Obscene and immoral.
Ill. Appellate Court: Not obscene or immoral.

Permit issued.

Times Film Corporation v. *City of Chicago*, 355 U. S. 35 (1957) (*The Game of Love*):

Censor Board: Obscene and immoral.
Master's Findings: Not obscene or immoral, ordinance unconstitutional.
Advisory Jury: 11 to 1. Obscene and immoral. (Without instructions.)
Trial Court: Obscene and immoral, ordinance constitutional.
U. S. Ct. of Appeals: Obscene and immoral, ordinance constitutional.
U. S. Supreme Court: Reversed per curiam.

Permit issued.

Appendix C

List of Cases Arising Under Municipal Ordinance in Question

Times Film Corporation v. *City of Chicago*,
U. S. District Ct., Northern District of Ill.,
Eastern Division, 57 C 2017 (*Nana*):

Censor Board: Obscene and immoral.
Settled after suit was filed.

Permit issued.

Paramount Films v. *City of Chicago*,

U. S. District Ct., Northern District of Ill.,
Eastern Division, 58 C 437 (*Desire Under the Elms*):

Censor Board: Adults only.
Trial Court: That section of ordinance unconstitutional.

Permit issued.

Capitol Enterprises v. *City of Chicago*,
260 F. 2d 670 (C. A. 7, 1958) (*Mom and Dad*):

Censor Board: Obscene and immoral.
Trial Court: Obscene and immoral, ordinance constitutional.
U. S. Ct. of Appeals: Not obscene or immoral.

Permit issued.

Columbia Pictures Corp. v. *City of Chicago*,
U. S. District Ct., Northern District of Ill.,
Eastern Division, 59 C 1058 (*Anatomy of a Murder*):

Censor Board: Obscene and immoral.
Trial Court: Not obscene or immoral.

Permit issued.

APPENDIX D

Relevant Portions of Municipal Code of Chicago

Chapter 155.

Motion Pictures.

Exhibition.

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

Appendix D

Relevant Portions of Municipal Code of Chicago

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. (Amend. Coun. J. 12-21-39, p. 1396).

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibi-

tion of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the mind of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.